United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-1042

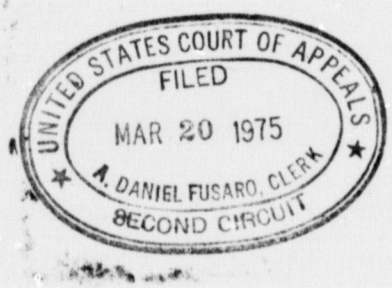
To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JOSE KENNETH PENERANDA, Appellant.	Docket No. 75-1042

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
-v.-	:	Docket No. 75-1042
JOSE KENNETH PENARANDA,	:	
Appellant.	:	

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

QUESTION PRESENTED

Whether the district court was precluded from asserting jurisdiction over Jose Kenneth Penaranda and should have dismissed the indictment charging him with violations of the narcotics law.

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Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles E. Stewart) rendered on December 31, 1974, after a plea of guilty, convicting the appellant of conspiring to import narcotic drugs in violation of 21 U.S.C. §846 and sentencing him to a prison term of two years and three years' special parole. Appellant preserved his right of appeal, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure, by stipulation. (See Stipulation dated December 31, 1974, annexed as "D" to Appendix). The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On August 3, 1973, an indictment was filed in the Southern District of New York, charging appellant, a storekeeper living in La Paz, Bolivia, and fifteen others with importation into the United States and distribution of narcotic drugs. The indictment charged overt acts in Ecuador, Peru, Chile, France and the United States.* Appellant was

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* The indictment is annexed as "B" to appellant's appendix.

the most minimally involved in the conspiracy, acting as a courier during only a portion of it (56, 59).*

By motion dated June 10, 1974, appellant sought dismissal of the pending indictment due to lack of jurisdiction based upon his allegations of illegal detention and abduction from Bolivia. On November 21, 1974, a hearing on this issue was held before the Honorable Charles E. Stewart, who orally denied appellant's application subject to receipt of an affidavit of Roger Brewin, who was the United States Deputy Chief of Mission to Bolivia at the time of the instant occurrence (36). Upon receipt of Mr. Brewin's affidavit on December 31, 1974, Judge Stewart again orally denied appellant's motion. At neither time did Judge Stewart specify his reasons for denying appellant's application (See informal decision of the District Court annexed as "C" to appellant's appendix).

Upon the filing of the indictment in August of 1973, bench warrants were issued for the arrests of the defendants.** In late 1973, Drug Enforcement Administration ("DEA") Agent Marcelino Bedolla,*** William Stedman, the American Ambassador to Bolivia, and Roger Brewin, the Deputy Chief of Mission to

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* Numerals in parenthesis refer to pages of the transcript of the hearing held pursuant to the motion by appellant.

** Affidavit of James E. Nesland at 1, docketed as part of the record on appeal.

*** Bedolla was assigned at that time to La Paz, Bolivia.

Bolivia, discussed the possible expulsion of appellant, a Bolivian national, from Bolivia to the United States (17). On January 30, 1974, Mr. Brewin talked of the matter with Walter Castro, then the Minister of Interior of Bolivia (18). Castro required that he be supplied with a certified copy of the arrest warrant and indictment (19). On March 28, 1974, Mr. Brewin delivered to Walter Castro's successor, Juan Pereda Asbun, the necessary documents. (Record on Appeal, Doc. No. 52 at 3).

On May 4, 1974, appellant, in his own car, was brought by two unidentified individuals, to a police "section" of La Paz called San Pedro. He had been told that his son was under arrest (3). Others, also not in uniform arrived and informed appellant that it was he who was under arrest. Without identifying themselves or informing appellant of the charges involved, these men forcibly placed appellant in the rear of his car and removed the keys (4). Though he did not know it, appellant's captors were members of Bolivia's Department of Organ Political, the political police, assigned to the Minister of the Interior (25).

Appellant was taken to another police "section". There his glasses were removed and a blanket and a raincoat were tied around him. He was then driven outside of La

Paz, where, bound by the blanket and raincoat, he was transferred to a jeep, which continued the journey (4). Arriving at the destination, appellant's pockets were emptied; his face masked, and his hands bound (5). He was placed in a room where he was beaten until he lost consciousness (5). Approximately a day later, appellant's captors returned, and he was beaten once again. Appellant was given neither food nor water at this time (6). On Monday, May 6, 1974, Penaranda was handcuffed and his mask removed. He was not allowed to communicate with any members of his family or a lawyer (10).

Meanwhile on May 6th, Bedolla was told by Mr. Brewin that he should make arrangements for appellant's transportation to the United States (21). Thereupon Bedolla made reservations for three individuals on a flight out of Bolivia on May 9th (22). On May 7th, Bedolla was informed by Brewin that the Bolivian Minister of Interior wanted appellant out of Bolivia that night but wanted no publicity about the abduction (24). Bedolla contacted the head of the political police, Guido Benavides, and made arrangements for appellant's departure on May 9th (25). On May 8th, Bedolla again telephoned Benavides, informing him that Eugene Castillo, an agent of the Drug Enforcement Administration, "would be

coordinating this thing with him . . . "(26), and Bedolla was informed that Carlos Balda would be in charge of Bolivian cooperation on the date of departure.

The following day, a well-dressed individual entered appellant's place of imprisonment (7). In his desperation, appellant grabbed this individual, asking for news of his mother. Five men started beating appellant but were stopped by this individual who told him he would be going home (8).

A mask was placed over appellant's eyes and a blanket wrapped around him. He was placed in a jeep and transported to the rendezvous with Bedolla and Castillo (8). There, appellant, still bound and masked, was transferred to the American car (8). Balda, Bedolla, Castillo, and appellant proceeded to the airport, where Castillo, Balda and appellant boarded the airplane for the flight to New York (28).

At no time during his confinement was appellant allowed to speak with a lawyer or informed of any charges lodged against him. Nor did he see any documents (10-11). In fact, appellant's name is not reflected in the manifest of his flight to the United States for he was abducted to

New York under the name of Bellona Marcelino.* The Government has never received any documents formally expelling appellant from Bolivia (35).

Upon his arrival in New York, appellant was questioned by agents of the Drug Enforcement Administration and by Assistant United States Attorney Bancroft Littlefield and thereafter arraigned.**

After Judge Stewart denied appellant's motion to dismiss the charges against him, appellant entered a guilty plea on December 31, 1974, preserving his right of appeal by stipulation.***On January 23, 1975, appellant was sentenced to a prison term of two years and three years' special parole (61).

I

THE DISTRICT COURT IS PRECLUDED FROM ASSERTING JURISDICTION OVER JOSE KENNETH PENARANDA AND THE INDICTMENT CHARGING HIM WITH NARCOTICS VIOLATIONS SHOULD BE DISMISSED.

The recent case of United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) and United States ex rel Lujan v. Gengler (Docket No. 74-208, slip op. 1199, 1204, 1209) ___ F.2d ___ (2d Cir. 1975) require that an indictment be dismissed if the Court's jurisdiction over a foreign national were effectuated as a result of brutal or inhumane treat-

* Affidavit of Larry S. Greenberg dated October 24, 1974 at 2, docketed as part of the Record on Appeal.

** Affidavit of Larry S. Greenberg dated June 10, 1974 at 2, docketed as part of the Record on Appeal.

*** United States v. Faruolo, 506 F.2d 490, 491, n.2 (2d Cir. 1974). United States v. Mann, 451 F.2d 346 (2d Cir.1971).

ment by United States government officials or others acting as their agents.* The instant case involves facts which are governed by this principle. Appellant was bound, masked and transported to secret confinement. There, he was beaten on at least two different occasions and held incommunicado for five days without being advised of the reason for his detention. This occurred as a result of the United States government's request for appellant's expulsion from Bolivia and as part of an orchestrated attempt to apprehend the various defendants charged with participating in this conspiracy. In short, Lujan and Toscanino are clear in precluding the exercise of jurisdiction as a consequence of the kind of cruel, inhumane, and outrageous conduct present

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* This holding, based upon an expanded and enlightened view of due process [See Rochin v. California, 342 U.S. 65 (1952); United States v. Russell, 411 U.S. 423, 430, 431 (1973); Mapp v. Ohio, 367 U.S. 643 (1961); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961)] and this Court's supervisory power over the administration of criminal justice in this Circuit, seriously eroded the so-called "Ker-Frisbee" rule that "due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant." United States v. Toscanino, supra, 500 F.2d at 272. See Ker v. Illinois, 119 U.S. 436 (1886); Frisbee v. Collins, 342 U.S. 519 (1952).

However, not every abduction from a foreign country requires that the Court divest itself of jurisdiction. United States ex rel Lujan v. Gengler, supra. Thus, for example, claims which neither involve brutal conduct or torture nor violations of international law or treaties do not rise to the level of due process violations. United States ex rel. Lujan v. Gengler, supra at 1208, citing United States v. Cotton, 471 F.2d 744 (9th Cir.1973).

in the instant case (4-9), United States ex re Lujan v. Gengler, supra at 1204. Such conduct must shock the conscience of this Court and mandates dismissal of the indictment. Rochin v. California, 432 U.S. 165 (1952); See also, Johnson v. Glick, 481 F.2d 1028, 1031 (2d Cir. 1973); Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973); Morgain v. Libiak, 368 F.2d 338, 340 (10th Cir. 1966); United States v. Price, 383 U.S. 787, 793 (1966); Williams v. United States, 341 U.S. 97, 101 (1951).

Moreover, United States government officials and their agents were involved in Penaranda's abduction so as to come within the required terms set forth in Toscanino. There, this Court stated:

> Whether or not United States officials are substantially involved, or foreigners are acting as their agents or employees is a question of fact to be resolved in each case. Stonehill v. United States, 405 F.2d 738, 743-745 (9th Cir. 1968) (United States v. Toscanino, supra, 500 F.2d at 280 n.9).

The standard has been described as one requiring a joint venture or joint operation between the United States and foreign officials. Stonehill v. United States, 405 F.2d 738, 743-744 (9th Cir. 1968).

Here, appellant's arrest was instigated by the United States government for violations of federal law (com-

pare Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967) and was the result of the American Embassy's request for his expulsion from Bolivia. It is undisputed that Drug Enforcement Administration agents Marcelino Bedolla and Eugene Castillo synchronized plans with the Bolivian political police for Penaranda's departure from Bolivia and were aware of appellant's confinement, at least, as of May 6, 1974. An escort for Penaranda was provided by a member of the Bolivian political police as well as by Agent Castillo. These facts should be considered in the context of the inevitable coordination of government activity necessary to apprehend the various defendants in this world-wide conspiracy* and the practical consideration of the relative positions of the governments of the United States and Bolivia.

Moreover, the actions involved in the instant case can only be viewed in light of the fact that the United States Government has previously paid police agents of Bolivia (See United States ex rel Lujan v. Gengler, supra at 1199) for services rendered

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* In the instant conspiracy, nine defendants have apparently preserved claims similar to that at issue and which this Court may be called upon to decide. In United States ex rel Lujan v. Gengler (Docket No. 74-208, slip op. 1199) the Court noted that the financial cost of illegal abductions, the possibility of alienating other nations, and the risk that the kidnappers would be prosecuted in a foreign territory for their offense would pose a practical obstacle to widespread illegal abductions. This has not occurred.

in similar situations. The facts of this case establish the required nexus in order to assert that United States officials were "substantially involved" and that the Bolivians were acting not in their capacity as Bolivian police but as enforcers of United States law. See Lustig v. United States, 338 U.S. 74 (1949). This aspect of the case at hand distinguishes those cases in which foreign police were acting pursuant to their own domestic law. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965); United States v. Callaway, 446 F.2d 753, 755 (3rd Cir. 1971); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970). The harm suffered by Penaranda occured as a result of the Government's attempt to forcibly transport him to the jurisdiction of the United States. The Government should not be allowed to escape the consequence of their request and actions in apprehending Penaranda.

In effect the United States Government and members of the Bolivian political police acting as the Government's agents conspired to abduct appellant illegally from Bolivia. They violated 18 U.S.C. §1201, the Federal Kidnapping statute.

> And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.'
>
> (Pinkerton v. United States, 328 U.S. 640 (1946).

Thus, all acts of the Bolivian agents which tended to effectuate the abduction (e.g. beatings) are attributable to the Government. See e.g., Gooch v. United States, 82 F.2d 534, 537 (10th Cir. 1936), cert. denied, 298 U.S. 658 (1935).

In discussing the analogous requirements necessary to assert that a search was accomplished by a Federal official, the Supreme Court remarked:

> . . . that a search is a search by a Federal official if he had a hand in it. (Lustig v. United States, supra 338 U.S. at 78 (1949).

Significantly Lustig states that a search would be considered to be that of a federal official if the federal agent "originated the idea," Lustig v. United States, supra 383 U.S. at 79.

Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) would also indicate that the action involved in the instant case must be considered that of Federal agents. See also United States v. Davis, 482 F.2d 893, 897 (9th Cir. 1973). Corngold involved an analogous issue. That is, whether a search conducted by an employee of the Trans World Airlines pursuant to a right of inspection was private and therefore without the scope of the exclusionary rule or one conducted in aid of federal law enforcement. The

Court stated that the employee did not act in furtherance of any purpose of the carrier and participated in the search to serve the purposes of the Government and as a result of a Government request. Corngold v. United States, supra 367 F.2d at 5. Holding that the action of the employee was federal action, the Court ruled inadmissable the evidence gained as a result of the search. Corngold v. United States, supra, 367 F.2d at 5. Likewise, in the context of a similar issue, it has been held that a parole officer, acting on the prior request of law enforcement officials and in concert with them was acting, "not as the supervising guardian, so to speak, of the parolee, but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed." Smith v. Rhay, 419 F.2d 160, 163 (9th Cir. 1969).

The words of Justice Brandeis dissenting in Olmstead v. United States, 277 U.S. 438, 484-85 (1928) are perhaps even more applicable in this modern age than they were when written:

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendcant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination . . .

> To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

The Government's conduct and its effect in the instant case should not be condoned.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the indictment returned against appellant, dismissed.

Respectfully submitted,

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